



THE CLARK GROUP

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The NEPA Task Force
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To the NEPA Task Force:

The Clark Group is pleased to provide comments to the NEPA Task Force and commends the Chairman of the Council on Environmental Quality and his staff for undertaking the challenge to improve and modernize the implementation of the National Environmental Policy Act. We believe that NEPA is the basic charter for the protection of the environment. It is a statute that has served the nation well and it needs no modification. It was intended to provide the public an opportunity to shape the decisions of the federal government. However, the manner in which the agencies have implemented the NEPA mandate and the CEQ Regulations receives a mixed review from our group.

We offer the following comments in the spirit of assisting the Task Force in developing meaningful improvements in the process.

Many agencies have figured out how to "comply" with NEPA and its documentation requirements. NEPA was intended to provide objective analysis and transparency so that the public may have a better understanding of the effects of federal actions. Its implementation has become far too focused on legal strategy, rather than a strategic way to plan and explain the effects of federal actions. While this approach may avoid litigation, it is doing so at a high cost to taxpayers and the environment. Many citizens are frustrated with huge documents that are impossible to lift, much less read, digest, and comment upon intelligently.

It is important that the Task Force focus not only on improving the efficiency of NEPA process. While that is important, it is more important to seek new, innovative ways for the agencies to meet their responsibility to the American public. Technology and information management systems can help achieve efficiencies and reduce the cost of analysis, public involvement and documentation, but the focus should be on achieving the intent of the law.

We believe there are several improvements that can be made administratively that will help agencies meet the NEPA mandate while reducing the costs. We have arranged our analyses and recommendations in the order of descending priority.

Use of Environmental Assessments: As CEQ has pointed out many times, there are more than 50,000 Environmental Assessments prepared each year and only about 500 draft, final, and supplemental Environmental Impact Statements. Many of these environmental assessments incorporate mitigation to assure that the effects are not significant. We find no fault with

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"mitigated Findings of No Significant Impact" *provided* the public gets an opportunity to review and comment on the Environmental Assessments and the findings and that the cumulative effects are taken into account.

Currently, there are agencies that do not make their EAs and findings public. This is a major shortcoming in implementing the law. If CEQ believes that the current regulations do not require public review and comments on EAs, then we strongly recommend modification of the CEQ regulations. In light of this continued trend toward preparation of EAs, greater public scrutiny is warranted. Certainly, the question of the efficacy of mitigation and the agency commitment to mitigation should be subject to public review.

Clearly, most environmental assessments today include some form of monitoring or mitigation. Agencies have different approaches and ideas on both monitoring and mitigation and in some cases agencies may be monitoring the same resources within an ecosystem. They could even be mitigating some projected impact to a resource that then may be disturbed by another agency (e.g. restoring a right of way which will be disturbed by another agency in the near future). Some agencies use scarce resource to develop monitoring and mitigation plans then fail to share these with other agencies (or even other departments within the same agency). An exception to this is the U.S. Department of Transportation, Federal Highway Administration's publication *Community Impact Mitigation* (May 1998) which identifies in summary form how different mitigation was employed in specific situations.

An effective way to cut costs, standardize approaches and share information across agencies is to develop a central Internet-based clearinghouse of NEPA-based monitoring and mitigation programs, approaches, and strategies employed by resource type and location (geo-referenced). This clearinghouse would allow resource managers to go to one location to see what others were doing in a specific ecosystem and with a specific resource base. Unfortunately, most monitoring and mitigation is buried in existing EAs or other agency documents and needs to be extracted, categorized, geo-referenced, and summarized to be useful. This is a project that could be undertaken by the Task Force and yield substantial agency savings in the future. In addition, such an approach would include the mechanism and format for agencies to include future monitoring and mitigation information in a centralized place, to which the public would have access. This Monitoring and Mitigation Clearinghouse could be maintained as part of the very useful NEPANet currently maintained by CEQ.

In terms of addressing the cumulative effects of an action, agencies are often correct that their action does not have a significant effect on the environment and after preparation of an EA, conclude their NEPA responsibilities are finished. However, often multiple federal agencies are operating within the same ecosystem and there are no institutional mechanisms for coordinating the actions of all the agencies in that ecosystem. For instance, the Forest Service and the Bureau of Land Management may issue grazing permits within the same watershed and each of the agencies may prepare an EA and a finding of no significant impact. In fact, the Forest Service itself may prepare two different EAs on two different allotments on the same forest, partly as a result of the timing of the permit. This not only fails to capture the cumulative effects of the federal authorization to graze on public lands, it costs more time and money than is necessary.

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Recommendations:

Revise CEQ Regulations regarding the use of the Environmental Assessment.

- Revise Regulations to stipulate that all EA's are to be made public via the Internet in a timely manner (in order to reduce delay and costs).
- Revise the CEQ regulations to reflect the spirit and method of CEQ's Cumulative Effects Handbook (including inclusion of all activities occurring within the resource base)
- Develop a protocol for a Monitoring and Mitigation database and information system that could be used for current and future agency programs. Such a protocol would include monitoring procedures, geographic coverage, level of analysis, types of tests to be used, methods for determining significance, reporting frequency and reporting process.
- Develop a plan for incorporating the monitoring and mitigation clearinghouse as part of NEPANet.

Federal and Intergovernmental Collaboration: One of the major points raised during the debate over the passage of NEPA was that agencies rarely coordinate their actions. The provision to prepare a "detailed statement" was supposed to have promoted that coordination but it has not been fully successful. With regard to grazing, for example, the Forest Service and the Bureau of Land Management have two different NEPA regulations and there has traditionally been resistance to coordinating those regulations. Field range managers consequently have a different culture and different procedures for meeting their NEPA responsibilities, even when managing within the same watershed.

On the other hand, the Federal Highway Administration prepared a *Red Book* to facilitate cooperation among the FHWA, the Corps of Engineers, the Environmental Protection Agency, the Fish and Wildlife Service and the National Oceanic and Atmospheric Administration. This effort did improve the coordination level and while it was prepared in 1988, it could be updated and serve as a model for other agencies to follow.

If the federal agencies are reluctant to coordinate among themselves, they are downright resistant to coordinating with American Indian Tribes. Our experience in the Snohomish, Washington watershed, for example, is that the Tulalip Tribes have very good data, knowledge, skills, abilities, as well as rights with respect to certain natural resources. Yet, the agencies rarely coordinate their findings from EAs and have never asked the Tulalip Tribes to be a cooperating agency. The federal government makes many decisions that affect the quality of tribal life, including decisions that have significant environmental effects. While the Council on Environmental Quality's regulations implementing the National Environmental Policy Act anticipate that federal agencies will ask tribes to cooperate in the preparation of environmental impact analyses, the regulations also serve to limit tribal participation.

The Council on Environmental Quality regulations implementing the National Environmental Policy Act were originally published in the Federal Register on November 28, 1978 (*See* 40 C.F.R. §1500.1 *et seq.*). At the time, those regulations made a good-faith effort to include tribal

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governments in the NEPA process. Specifically, 40 CFR §1508.5 specifies that a state or local agency or "when the effects are on a reservation, an affected Indian tribe" may, by agreement with the lead agency, become a cooperating agency. In a number of sections, these regulations restrict tribal involvement to those instances where the effects are on a reservation. This limitation ignores the fact that tribal interests, including trust interests, may be impacted by actions that do not directly affect a reservation but which may, for example, affect traditional hunting or fishing rights that have been guaranteed by treaties entered into between the Federal government and an Indian tribe. In other sections, the Council on Environmental Quality regulations wholly ignore the legitimate role of Indian tribes in the NEPA process and the government-to-government relationship between the Federal government and federally recognized Indian tribes. For example, 40 C.F.R. §1501.5(b) states that "Federal, State, or local agencies including at least one Federal agency, may act as joint lead agencies to prepare an environmental impact statement."

In the Pacific Northwest, and many other regions, the environmental effects need not fall directly upon a reservation to have catastrophic effect on the affected Indian tribe. Environmental effects on regional salmon runs dramatically affect the tribes' ability to catch or market fish, even when there is no discernable biophysical effect *on* the reservation. The fate of the salmon in the Pacific Northwest is not clear and many actions taken by the multiple agencies of the federal government will help determine the robustness and eventual survival of the stock. The Tulalip Tribes want a role in the analysis and the decision-making about these matters, whether or not the effects are on the reservation. The Tulalip has petitioned CEQ to make the necessary modifications to its regulations. In many cases the tribes have special expertise which the federal agencies may lack.

Recommendations:

- CEQ should adopt and update the Red Book to serve as a model for all the agencies to follow and put the Red Book on NEPANet
- Revise the CEQ Regulations to require agencies to seek cooperating agency status of tribes that have special expertise or jurisdiction where trust resources may be affected.

Programmatic Analysis and Tiering. CEQ regulations that govern programmatic analysis and tiering need comprehensive revision. They do not recognize, for example, major differences that occur in the use of program statements for different kinds of agency actions. A program statement for a national forest plan, for example, presents very different problems than a program statement for a related series of individual projects, such as highway and transportation projects.

CEQ regulations need to provide more specific guidance on when program statements are required. The present regulations are simply too vague to be of much use in practice. By this time it should be possible to identify more specifically the kinds of actions that require program statements and list them in the regulation. Attention must also be given to the relationship between program statements and statutory requirements that appear in other statutes and that

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affects the programs and plans to which NEPA applies. An example is the statute that applies to fishery plans.

Guidance is also needed on the content of program impact statements: what issues they should cover, and how they should be handled. There is very little case law on this topic, so that guidance from CEQ on program impact statement content is much needed.

There is also a considerable amount of uncertainty concerning the need to prepare detailed, action-specific impact statements once a program statement has been prepared. The courts consider this issue on a case-by-case basis. As a result, neither the agencies nor concerned citizens can know with certainty whether additional and more specific analysis is required until there is litigation.

Recommendation:

Develop regulations and guidance that indicates when a discussion of a particular impact or issue in a program statement does not need additional analysis in a site-specific document. This regulation would not bind federal courts, but would at least provide some presumptive indication of when a program impact statement needs additional detailing.

Categorical Exclusions. CEQ regulations for categorical exclusions (CEs) also present a problem. CEQ provided the CE as a preliminary stage of analysis that could avoid additional and more detailed environmental work. Unfortunately, confusion about the role of CEs and a failure to link CEQ regulations for CEs with other steps in the NEPA process make it difficult to distinguish the CE as an independent step in NEPA analysis.

Although there are a number of criteria agencies are required to use in determining whether they may prepare a CE instead of an environmental assessment, the way in which the regulations are written makes the decision on whether an agency can use a CE turn on whether its environmental effects are significant rather than on what type of action or project is contemplated. The regulations also state an agency may not use a CE if the environmental effects of an action are controversial.

This is confusing and unfortunate, and is a result of the regulation using generalized criteria that describes the effect of an action to determine whether an agency can use a CE. This problem also arises from the tendency of some agencies to use an umbrella catchall phrase as the basis for deciding when a CE can be used in addition to specific lists of actions that can be reviewed through a CE. An example would be a regulation that allows the use of a CE for "similar" actions.

Another problem with CEs is that agencies devote too many resources to preparing them. In many cases the CE document is as detailed and expansive as an environmental assessment. If allowable CEs were limited to listed actions, the only information needed would be information showing a particular action falls within a listed category. There would be no need for the kind of

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more comprehensive analysis that is required at the environmental assessment stage to determine whether an action has significant environmental impacts that require the preparation of an environmental impact statement.

Recommendations:

- CEQ could provide some guidance for the preparation of CE lists. The guiding principle should be that the CE should apply only to those actions and projects that would not require an EIS under any circumstances.
- Limit agencies to specific lists of actions and projects they decide can be the subject of a CE and to eliminate any generalized criteria, such as controversy. Agencies could revise their CE lists from time to time as experience indicates which actions and projects can be included.

Technology, Information, Management, and Information Security. One of CEQ's major cost savings accomplishments has been the implementation and maintenance of NEPANet (made possible through considerable contributions from the Department of Energy). This Internet based information system allows a gateway into the CEQ, its regulations, legislation, NEPA publications and other resource material. In addition, NEPANet serves as a gateway to Federal Agency environmental programs, NEPA documents and NEPA actions. To CEQ's credit, it highlighted its accomplishments in its 1997 Report *Environmental Quality: The World Wide Web* and showed how the web makes for more efficient environmental decision-making. The greatest potential for potential for increased efficiency of information management among Federal Agencies will be through further coordinated development of environmental information systems. This cannot be done without investment in the future, but because most NEPA activities are funded at the project level, agency investment in environmental information management remains uncoordinated. An example of investing in the future for increased efficiency is the investment made by the Bureau of the Census in order to digitize all maps for the 1990 Census. This action has enabled not only the geo-referencing of all demographic data but also the widespread use of digitized maps for other applications – many of which are used in environmental analyses but are also used to look up an addresses on the Internet or to find your way with a handheld GPS unit capable of mapping. Similar transformation could take place in the environmental area if CEQ were to lead the way in specifying the model for the environmental management system protocol for the 21st Century.

Recommendations:

- Conduct a series of workshops among the key agencies, NGO's and professional organizations in order to identify a priority list of coordinated information technology needs, areas of specific expertise, areas of duplication and areas in need of standardization.
- Develop a public input module for NEPANet in order to use the site as a vehicle for dialog and suggestions on increasing the utility of the web site

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- Identify additional agency resources available on the web which could be linked to NEPANet for more effective and efficient utilization of agency information
- Identify examples for managing models, data and maps (e.g. the agreement on GIS standards within the Dept. of Defense)
- Identify capabilities within the agencies for developing and maintaining new modules for NEPANet
- Develop a work plan for moving NEPANet into the 21st Century and an associated budget

Strategic Environmental Assessment. Finally, if NEPA is ever to serve as a real decision-making tool, it must focus on strategic decisions. Our group recommends a new category of environmental impact analysis be developed; the Strategic Environmental Assessment (SEA). The U.S. has a long history of preparing "programmatic" EIS, but few are prepared, they are more costly, and lead to as much litigation as any other form of NEPA analysis. In one sense programmatic is "strategic", but to realize the full potential of SEA will require formulation of a new model of EIA and decision-making. In this model, strategic EIA will be prepared very early. It will be a short, concise analysis from which subsequent analyses will be tiered. It will be available to decision-makers before legislation is being debated and before the site specific information is gathered. The analysis will focus on paths, not places. It would not be subject to litigation because the decisions would not lead to an irretrievable commitment of resources. The second-level analysis would be on the programs the strategy yields. At a watershed or ecosystem level, multiple agencies operating within a common ecosystem would work together to prepare analyses on the federal initiatives within that ecosystem.

Richard Andrews¹ makes the argument that one of NEPA's most fundamental limitations has been the rarity of its influence on truly major federal decisions at the policy, programmatic, and legislative levels. While the EIS is done at the project level, policies, legislative initiatives, or appropriations bills that underlie them are major federal actions that create far more pervasive impacts. Andrews cites government policies with perverse environmental results like agriculture crop payment formulas, below cost timber sales, fossil fuel and mining subsidies and differential investments in highways as opposed to mass transit. A major finding of the CEQ's NEPA Effectiveness Study was that the analytical process is triggered too late to be fully effective. NEPA's purpose to consider alternatives, weed out poor proposals and support innovation is stifled by the timing of the analysis.

The General Accounting Office issued a report on the Forest Service's decision making process and concluded that there are major inefficiencies in developing forest plans and reaching project level decisions. The study suggested that environmental analysis accompanying a plan or project be "tiered" or linked to a broader-scoped environmental study. Similarly, the Chief of Engineers Environmental Advisory Board in 1995 said that the Corps needs to review its integrated planning policy for all missions to ensure that EIA begins at the inception of a plan and continue through the completion of the project. One of the most vexing questions about EIA has always been how early is "early". Perhaps SEA can help answer that question.

¹ In *Environmental Policy: Past, Present, and Future*, Clark and Canter, 1997.

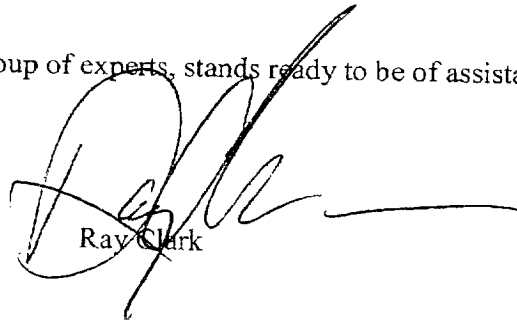
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What is SEA? We need different procedures for SEA than EIA. While the principal analytical elements are similar, there are significant differences. SEA must be more flexible, allowing the decision-maker to take those elements that are useful, the inception and extent of public involvement will be up to the decision-maker who must see the benefit of SEA. This emphasis on monitoring rather than certainty will yield new information that under ordinary circumstances may procedurally call for a new EIA. Because SEA should lead to a shorter, simpler, more open process, perhaps SEA itself should have no procedural requirements. The new model does it a different time, covering a different scope, maintaining the science and art of impact analysis while modifying those things that remove the obstacles of doing it earlier.

Recommendations:

- Our group recommends a new category of environmental impact analysis be developed; the Strategic Environmental Assessment (SEA).
- CEQ should develop a handbook on SEA and training for agency decision-makers on using SEA to increase the efficiency and efficacy of environmental decision-making.

The Clark Group, with its diverse group of experts, stands ready to be of assistance to the Task Force.



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